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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 113

CHESTER GAINES AND THERESA GAINES, HUSBAND AND WIFE, PETITIONERS,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 29, 1940.

CERTIORARI GRANTED OCTOBER 14, 1940.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 113

CHESTER GAINES AND THERESA GAINES, HUSBAND AND WIFE, PETITIONERS,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 5, 1940.

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Docket Entries.

1

DOCKET No. 93,806.

CHESTER GAINES and THERESA GAINES,
Husband and Wife,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

2

APPEARANCES:

For Taxpayer: FRANK E. KARELSEN, JR., Esq.

For Commissioner: CONWAY KITCHEN, Esq.

1938

May 25—Petition received and filed. Taxpayer notified.
(Fee paid.)

May 25—Copy of petition served on General Counsel.

June 16—Answer filed by General Counsel.

June 16—Request for Circuit hearing in New York City
filed by General Counsel. 3

June 21—Notice issue placing proceeding on New York,
N. Y. calendar. Answer and request served.

1939

Apr. 10—Hearing set May 22, 1939, at New York City.

May 22—Hearing had before Mr. Sternhagen on merits.
Submitted. Stipulation of facts filed. Briefs
due June 15, 1939.

June 1—Transcript of hearing of May 22, 1939, filed.

June 5—Brief filed by General Counsel.

June 15—Brief filed by taxpayer. June 16, 1939, copy
served.

Petition.

June 26—Memorandum opinion rendered John M. Sternhagen, Division 10. Decision will be entered for the respondent.

June 26—Decision entered, J. M. Sternhagen, Division 10.

Sept. 20—Petition for review by United States Circuit Court of Appeals (Second) with assignments of error filed by taxpayer.

Sept. 20—Proof of service filed by taxpayer.

Oct. 6—Praecipe for record filed by taxpayer with proof of service thereon.

5 Oct. 23—Amended Praecipe filed by taxpayer with proof of service thereon.

Petition.

(Filed May 25, 1938.)

UNITED STATES BOARD OF TAX APPEALS.

DOCKET No. 93,806.

[SAME TITLE]

The above named petitioners hereby petition for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:A:1 LHC-90D) dated February 28, 1938, and as a basis of their proceeding allege as follows:

1. The petitioners are individuals, and during the calendar year 1934 were married and living together as husband and wife. They reside at 1130 Park Avenue, New York City, N. Y.
2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to the petitioners on February 28, 1938.

Petition.

3. The taxes in controversy are income taxes for the calendar year 1934, and for \$5,008.55.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

The addition of \$18,031.59 to the income reported on the return of petitioners for the calendar year 1934, which addition is set forth under item marked (a) on pages 1 to 4 of said notice of deficiency, a copy of which is annexed hereto and marked Exhibit A. The foregoing addition is based upon the erroneous theory that capital losses of a wife may not be deducted from capital gains of a husband upon a joint return filed for the calendar year 1934, and that the wife is entitled to deduct only \$2,000. of her capital losses in excess of her capital gains.

5. The facts upon which the petitioners rely as the basis of their proceeding are as follows:

(a) During the entire calendar year 1934, the petitioners were married and living together as husband and wife.

(b) During the calendar year 1934, Chester Gaines sold stocks which had been held by him for less than one year and derived from such sales a gain of \$18,466.41.

(c) During the calendar year 1934, Theresa Gaines sold stocks which resulted in gains or losses to her as follows:

Gains from sales of stocks held one year or less	\$2,987.94
Gains from sales of stocks held over ten years	220.96
Losses from stocks held two to five years	37,091.63
Losses from stocks held five to ten years	2,077.13

10

Petition.

(d) The stock sold by Theresa Gaines and Chester Gaines, referred to in paragraphs (b) and (c) above, were capital assets, as defined under Section 117 and other applicable sections of the Revenue Act of 1934, as amended.

(e) The petitioners filed a single joint income tax return for the calendar year 1934 reporting therein their aggregate income in accordance with the provisions of Section 51 of the Revenue Act of 1934, as amended.

11

(f) The gain to Chester Gaines, recognized upon the sales of the foregoing stock, amounted to \$18,466.42. The net loss to Theresa Gaines, recognized upon the sales of the foregoing stock, amounted to \$20,031.60. The difference of \$1,565.18 was deducted as capital loss on the joint return filed by the petitioners for the year 1934. The joint income of the petitioners on said return, aside from the foregoing stock sales, exceeded the foregoing deduction of \$1,565.18.

12

WHEREFORE, the petitioners pray that this Board may hear the proceeding and rule that the determination of a deficiency of \$5,008.55 and the income tax liability of the petitioners for the calendar year 1934 is erroneous, and that no deficiency whatever exists with respect thereto.

(s) FRANK E. KARELSEN, JR.,
Counsel for Petitioners,
Office & P. O. Address,
% Karelsen & Karelsen,
230 Park Avenue,
Borough of Manhattan,
City of New York.

Petition.

State of New York, {
County of New York, }^{ss.}:

CHESTER GAINES, being duly sworn, says that he is one of the petitioners above named; that he has read the foregoing petition or had the same read to him, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

CHESTER GAINES. 14

Subscribed and sworn to before me
this 24th day of May, 1938.

SADIE SCHERR,
Notary Public, Kings County,
Kings Co. Clk's No. 894, Reg. No. 9202,
N. Y. Co. Clk's No. 1203, Reg. No. 9S813,
Bronx Co. Reg. No. 293S39,
Queens Co. Reg. No. 7132, Clk's No. 1876,
Nassau Co. Clk's No. 9547,
Term Expires March 30, 1939.

(Seal)

State of New York, {
County of New York, }^{ss.}:

THERESA GAINES, being duly sworn, says that she is one of the petitioners above named; that she has read the foregoing petition or had the same read to her, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to

16

Exhibit A, Annexed to Petition.

be upon information and belief, and those facts she believes to be true.

THERESA GAINES.

Subscribed and sworn to before me
this 23rd day of May, 1938.

17

SADIE SCHERR,
Notary Public, Kings County,
Kings Co. Clk's No. 894, Reg. No. 9202,
N. Y. Co. Clk's No. 1203, Reg. No. 9S813,
Bronx Co. Reg. No. 293S39,
Queens Co. Reg. No. 7132, Clk's No. 1876,
Nassau Co. Clk's No. 9S47,
Term Expires March 30, 1939.

(Seal)

Exhibit A, Annexed to Petition.

1091M

SN-N

Feb 28 1938

18

IT:A:1
LHC-90D

Mr. Chester Gaines and
Mrs. Theresa Gaines, Husband and Wife,
One Wall Street,
New York, New York.

Sir and Madam:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1934, discloses a deficiency of \$5,008.55, as shown in the statement attached.

Exhibit A, Annexed to Petition.

19

In accordance with section 272(a) of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:Cl:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

20

Respectfully,

GUY T. HELVERING,
Commissioner.

By (Signed) CHAS. T. RUSSELL,
Deputy Commissioner.

21

Enclosures:

Statement
Form 870

LHC/FB-2

22

Exhibit A, Annexed to Petition.

STATEMENT.

IT:A:1

LHC-90D

Mr. Chester Gaines and
 Mrs. Theresa Gaines,
 Husband and Wife,
 One Wall Street,
 New York, New York.

23

Tax Liability for Taxable Year Ended December 31, 1934

	Liability	Assessed	Deficiency
- Income Tax	\$9,247.81	\$4,239.26	\$5,008.55

24

In making this determination of your income tax liability, careful consideration has been given to the internal revenue agent's report dated May 28, 1936; to your protest executed July 13, 1936; to the statements made at the conference held on September 18, 1936, in the office of the internal revenue agent in charge at 615 Federal Office Building, 90 Church Street, New York, New York; to the protest dated January 24, 1938, signed by Frank E. Karelson, Jr., your representative, and to the statements made at the conference held in the Bureau on January 28, 1938.

A copy of this letter and statement has been mailed to your representative, Frank E. Karelson, Jr., 230 Park Avenue, New York, New York, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

Exhibit A, Annexed to Petition.

25

Adjustments to Net Income

Net income reported on the return \$34,594.80

Unallowable deductions and additional income:

(a) Loss claimed by Theresa Gaines from the sale of securities in excess of the limitation as provided by section 117(d) of the Revenue Act of 1934 on deductions for capital losses as recognized by the provisions of section 117(a) 18,031.59

\$52,626.39

26

(b) Dividends received from the Dominion Stores, Ltd., and the McIntyre Porcupine Mines, Ltd., transferred from item 10(a) of the return to item 10(c), the space provided for reporting such dividends 279.07

Total \$52,905.46

Nontaxable income and additional deduction:

(c) Dividends received from the Dominion Stores, Ltd., and the McIntyre Porcupine Mines, Ltd., transferred from item 10(a) of the return to item 10(c), the space provided for reporting such dividends 279.07

27

Net income as adjusted \$52,626.39

Explanation of Adjustments

(a) Careful consideration has been given to your contention that since the income of a husband and wife may be included in a single joint return and the tax computed

Exhibit A, Annexed to Petition.

on the aggregate income in accordance with the provisions of section 51(b)(2) of the Revenue Act of 1934, there is nothing in the Act to uphold article 117-5 of Regulations 86 relating to the income tax under the Revenue Act of 1934.

This office holds that the loss of \$35,959.86 sustained by Mrs. Gaines from the sale of securities as computed under section 111 and recognized under section 112 of the Revenue Act of 1934 and taken into account by her only to the extent of \$20,031.59 as provided by section 117(a),

29 is subject to the limitation on deductions for capital losses under section 117(d), that is, such losses "shall be allowed as deductions only to the extent of \$2,000.00 plus the gains from such sales and exchanges."

Attention is invited to the provisions of article 117-5, appearing on page 218 of Regulations 86 relating to the income tax under the Revenue Act of 1934:

30 "*Application of section 117 in the case of husband and wife.*—In the application of section 117, a husband and wife, regardless of whether a joint return or separate returns are made, are considered to be separate taxpayers. Accordingly, the limitation under section 117(d) on the allowance of losses of one spouse from sales or exchanges of capital assets is in all cases to be computed without regard to gains and losses of the other spouse upon sales or exchanges of capital assets."

Note also income tax ruling 2868, published in Internal Revenue Bulletin, Cumulative Bulletin XIV-1, pages 111-112, January, 1935, to June, 1935:

"Where a joint return is filed and the wife takes into account under section 117(a) of the Revenue Act of 1934 a loss of \$7,000.00 in excess of gains or sales

Exhibit A, Annexed to Petition.

of capital assets, she is limited to a deduction of \$2,000.00 under section 117(d) of that Act. Where the wife's income from other sources was only \$400.00, the balance of the deductible loss amounting to \$1,600.00 may be applied against the net income of the husband in computing the combined net income of the husband and wife in the joint return. (See T. D. 4511, page 107.)"

The following headnotes of the decisions of the United States Board of Tax Appeals in the cases of H. Denny Pierce and Alma C. Pierce, and Robert H. Montgomery and Lois C. Montgomery, published in United States Board of Tax Appeals Reports, Volume 37, No. 34 and No. 35, promulgated January 28, 1938, and February 1, 1938, respectively, sustain the provisions of article 117-5:

"Husband and wife filed a joint income tax return. The husband realized profits in the taxable year from sales of securities held less than two years but sustained no losses from such sales. The wife sustained losses in the taxable year from such sales but realized no profits from like sales. *Held*, under section 23(r)(1) Revenue Act of 1932, the wife cannot deduct the loss from her gross income, nor can the husband, in a joint return, offset the wife's loss against his profits."

* * * * *

"1. In applying the limitation on stock losses provided for in section 23(r)(1), Revenue Act of 1932, in a case where husband and wife file a single joint return, it is *held* that the losses of one spouse who had no gain from the sale or exchange of similar securities may not be used to offset the gains of the other."

(b) and (c) A review of your books of account and records disclosed that you received dividends of \$29.07

and \$250.00 from the Dominion Stores, Ltd., and the McIntyre Porcupine Mines, Ltd., respectively, and that these dividends were included in item 10(a) of the return, whereas they should have been reported in item 10(c). These dividends have accordingly been transferred from item 10(a) to item 10(c), the space provided on the return for reporting dividends received from foreign corporations.

Computation of Tax

35	Net income as adjusted	\$52,626.39
Less:		
	Credit for personal exemption	\$2,500.00
	Credit for two dependents	800.00 3,300.00
<hr/>		
	Surtax net income	\$49,326.39
Less:		
	Dividends (\$4,600.47—\$279.07)	\$4,321.40
	Earned income credit (10% of \$11,528.87)	1,152.89 5,474.29
<hr/>		
36	Net income subject to normal tax	\$43,852.10
	Normal tax at 4% on \$43,852.10	\$ 1,754.08
	Surtax on \$49,326.39	7,518.13
<hr/>		
	Total income tax liability	\$ 9,272.21
Less:		
	Income tax paid at the source	24.40
<hr/>		
	Correct income tax liability	\$ 9,247.81

Brought forward	\$ 9,247.81
Income tax assessed:	
Account #200333	4,239.26
Deficiency in income tax	\$ 5,008.55

LHC/FB-2

(Filed June 16, 1938.)

UNITED STATES BOARD OF TAX APPEALS.

DOCKET No. 93,806.

[SAME TITLE]

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named petitioners, filed May 25, 1938, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.
2. Admits the allegations contained in paragraph 2 of the petition.
3. Admits the allegations contained in paragraph 3 of the petition.
4. Denies that the respondent erred as alleged in paragraph 4 of the petition.

5(a), (b). Admits the allegations contained in subparagraphs (a) and (b) of paragraph 5 of the petition.

(c). Denies the allegations contained in subparagraph (c) of paragraph 5 of the petition.

(d). Admits the allegations contained in subparagraph (d) of paragraph 5 of the petition.

(e). Admits that a joint income tax return was filed by the petitioners for the taxable year 1934.

41 (f). Admits the allegations contained in the first sentence of subparagraph (f) of paragraph 5 of the petition but denies all other allegations contained in said subparagraph.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the determination of the respondent be in all things confirmed.

(Signed) J. P. WENCHEL,
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

CONWAY N. KITCHEN,
Special Attorney,
Bureau of Internal Revenue.

Memorandum Opinion.**UNITED STATES BOARD OF TAX APPEALS.**

DOCKET No. 93,806.

[SAME TITLE]

FRANK E. KARELSEN, JR., Esq., for the Petitioners.

CONWAY KITCHEN, Esq., for the Respondent.

STERNHAGEN: The Commissioner determined a deficiency of \$5,008.55 in petitioners' income tax for 1934 in part by adding to the jointly reported income of husband and wife a capital gain of the husband. The facts are stipulated. Petitioners contend that this gain may be offset by capital losses of the wife within the limitations of section 117(d), Revenue Act of 1934. The identical question was considered in *Walter C. Janney*, 39 B. T. A. 240 (on review C. C. A. 3), and decided contrary to petitioners' contention. For earlier years the same question arising under the similar section 23(r)(1), Revenue Act of 1932, the Second Circuit Court of Appeals, in *Pierce v. Commissioner*, 100 Fed. (2d) 397; *Demuth v. Commissioner*, 100 Fed. (2d) 1012, certiorari denied — U. S. — (May 2, 1939), and the First Circuit Court of Appeals in *Sweet v. Commissioner*, 102 Fed. (2d) 103, certiorari denied — U. S. — (May 1, 1939), reached the same conclusion. These decisions have just been followed by the Circuit Court of Appeals for the Fourth Circuit in *Nelson v. Commissioner*, — Fed. (2d) — (June 12, 1939). In accordance with those decisions.

44

45

Enter:

Entered June 26, 1939.

Decision will be entered for the respondent.

(Seal)

46

Decision.**UNITED STATES BOARD OF TAX APPEALS
WASHINGTON.****DOCKET No. 93,806.**

[SAME TITLE]

In accordance with the Board's Memorandum Opinion entered June 26, 1939, it is

47 ORDERED and DECIDED that there is a deficiency of \$5,008.55 in petitioners' income tax for 1934.

Enter:

Entered June 26, 1939.

(Signed) **J. M. STERNHAGEN,**
Member

Petition for Review.

(Filed September 20, 1939.)

48 UNITED STATES BOARD OF TAX APPEALS.

DOCKET No. 93,806.

[SAME TITLE]

To THE HONORABLE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT:

CHESTER GAINES and THERESA GAINES, the petitioners by FRANK E. KARELSEN, Jr., their attorney, feeling themselves aggrieved by the decision and order made and entered in this cause, hereby petition for a review of the decision and order by the United States Circuit Court

of Appeals for the Second Circuit for the reasons specified in the assignments of error which are filed herein and made a part hereof, and respectfully show:

I—The petitioners are individuals and citizens of the United States, and during the calendar year 1934 were married and living together as husband and wife, at 1130 Park Avenue, City and State of New York. For the calendar year 1934, the petitioners filed a joint federal income tax return with the Collector of Internal Revenue for the Third District of New York within the time required by law. 50

II—The respondent determined a deficiency in income taxes for the calendar year 1934 against the petitioners herein in the sum of \$5,008.55. In accordance with the provisions of the Revenue Act of 1934, respondent sent to the petitioners by registered mail, a notice of said deficiency. Thereafter, the petitioners filed an appeal from the said notice of deficiency with the United States Board of Tax Appeals. On June 26, 1939, the Board entered its decision and final order and determination wherein and whereby the Board ordered and decided the amount of the deficiency against the petitioners for the said calendar year to be in the amount determined by the respondent. 51

III—During the calendar year 1934, Chester Gaines sold securities which were capital assets as defined in Section 117 of the Revenue Act of 1934, and which had been held by him for less than one year, and he derived from such sales a recognized capital gain of \$18,466.41, the entire amount of which was required to be taken into account under Section 117 (a) of such Act. During the calendar year 1934, Theresa Gaines sold securities which were capital assets as defined in Section 117 of the Revenue Act of 1934, resulting in recognized and accountable capital gains or losses to her as follows:

Petition for Review.

Time Held	Profit or (loss)	Per cent	Gain or (loss) taken into account under Sec 117(a) of the Revenue Act of 1934.
1 year or less	\$ 2,987.94	100	\$ 2,987.94
2 to 5 years	(37,091.63)	60	(22,254.97)
5 to 10 years	(2,077.13)	40	(830.85)
Over 10 years	220.96	30	66.29
	(\$35,959.86)		(\$20,031.59)

53 On their joint return or the calendar year 1934, the petitioners offset the said gain of Chester Gaines, amounting to \$18,466.41, against the said loss of Theresa Gaines, amounting to \$20,031.59, claiming a net deduction of \$1,565.18 by reason thereof.

IV—The respondent determined that the limitation imposed by Section 117 (d) of the Revenue Act of 1934 should be applied separately to each of the petitioners and allowed Theresa Gaines to deduct only \$2,000. in excess of the amount of her gains taken into account, instead of said amount of \$20,031.59, which petitioners had deducted. Accordingly, respondent added the amount of \$18,031.59 to petitioners' net income.

V—The Board of Tax Appeals sustained the respondent. It held that the excess of Theresa Gaines' capital losses taken into account over her capital gains taken into account could not be deducted from the capital gain of Chester Gaines, except to the extent of \$2,000.

VI—The issue in the proceeding before the Board was as follows:

Could the petitioners in their joint return filed for 1934 deduct the entire excess of Theresa Gaines' recognized and accountable capital losses over her recognized

Petition for Review.

and accountable capital gains for that year, namely \$20,031.59, from the recognized and accountable gain of her husband, Chester Gaines, for the same year, namely \$18,466.41, thereby producing a net deduction of \$1,565.18.

VII—Petitioners assert that in the record and proceedings before the Board and in the decision and final order of determination rendered and entered by the Board manifest error occurred and intervened to the prejudice of the petitioners, and the petitioners assign the following errors, each of which they aver occurred in the record, proceedings, decision and final order of determination and upon which they rely to reverse the said decision and final order of determination so rendered and ordered by the Board, to wit:

ASSIGNMENTS OF ERROR.

The petitioners assign as error the following acts and omissions of the Board of Tax Appeals:

I—The order and decision that there should be included in the income of the petitioners the sum of \$18,466.41, being the recognized and accountable capital gain realized by Chester Gaines, without allowing the deduction of the entire sum of \$20,031.59, instead of only \$2,000. thereof, said sum of \$20,031.59 being the excess of Theresa Gaines' recognized and accountable capital losses over her recognized and accountable capital gains.

II—The order and decision that there should be included in the income of the petitioners the sum of \$16,466.41, being Chester Gaines' recognized and accountable capital gain of \$18,466.41 less \$2,000. of the excess of the recognized and accountable capital losses of Theresa Gaines over her recognized and accountable capital gains.

III—The order and decision that the petitioners should not be allowed in computing their net income to deduct

the sum of \$1,565.18, being the amount of Theresa Gaines' recognized and accountable capital losses in excess of her recognized and accountable capital gains, namely \$20,031.59, less Chester Gaines' recognized and accountable capital gain of \$18,466.41.

59

IV—The order and decision that the excess of the recognized and accountable capital losses of Theresa Gaines over her recognized and accountable capital gains, namely \$20,031.59, could not be deducted, except to the extent of \$2,000. thereof, from the recognized and accountable capital gain of Chester Gaines, namely \$18,466.41, to produce a net deduction of \$1,565.18 in the joint return filed by the petitioners.

V—The order and decision that the limitation contained in Section 117(d) of the Revenue Act of 1934 is to be applied separately to husband and wife when a joint return is filed.

60

VI—The failure to determine that under Sections 23(e) and 51(b) of the Revenue Act of 1934 the petitioners are entitled to deduct the recognized and accountable capital losses of one spouse from the recognized and accountable capital gains of the other spouse, and that the only effect of Sections 23(j) and 117(d) of such Act is to limit to a sum of \$2,000. the deductibility of the excess of such capital losses over such capital gains.

VII—The order and determination that there is a deficiency of \$5,008.55 in the petitioners' income tax for 1934 and the failure to determine that the amount of income tax paid by petitioners for said year constituted the total tax due from them for said year.

WHEREFORE the petitioners petition that the decision and order of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit, and that a transcript of record be prepared

Petition for Review.

in accordance with the law and with the rules of the said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by the said Court, and that the decision and order of the Board of Tax Appeals be reversed.

Respectfully submitted,

(S) **FRANK E. KARELSEN, JR.,**
Counsel for Petitioners,
230 Park Avenue,
New York City, N. Y.

State of New York, {
County of New York, }^{ss.}:

FRANK E. KARELSEN, JR., being duly sworn, deposes and says that he is the attorney of record of the petitioners above named; and as such, is duly authorized to verify the above and foregoing petition for review to the United States Circuit Court of Appeals for the Second Circuit; that he has read the said petition for review and is familiar with the statements therein contained and that the facts stated are true, except as to those facts stated to be upon information and belief and those facts he believes to be true.

FRANK E. KARELSEN, JR.

Sworn to before me this
19th day of September, 1939.

SADIE SCHERR,
Notary Public, Kings County,
Kings Co. Clk's No. 850, Reg. No. 1122,
N. Y. Co. Clk's No. 959, Reg. No. 1S600,
Bronx Co. Reg. No. 286-S-41,
Queens Co. Reg. No. 6739, Clerk's No. 1730,
Nassau Co. Clk's No. 42-S-41,
Term Expires March 30, 1941.

(Seal)

64

Notice of Filing Petition for Review.

(Filed September 20, 1939.)

UNITED STATES BOARD OF TAX APPEALS.**DOCKET No. 93,806.**

[SAME TITLE]

To:

65

J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

You are hereby notified that under date of September 20, 1939, a petition to have the decision of the Board of Tax Appeals in the above cause reviewed by the United States Circuit Court of Appeals for the Second Circuit was filed with the said Board of Tax Appeals. A copy of the petition for review is hereby served upon you.

66

(Signed) **FRANK E. KARELSEN, JR.,**
FRANK E. KARELSEN, JR.,
230 Park Avenue,
New York, N. Y.

Service of a copy of the foregoing notice, together with a copy of the petition for review, is hereby acknowledged this 20th day of September, 1939.

(Signed) **J. P. WENCHEL,**
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Stipulation of Facts.

(Filed May 22, 1939.)

UNITED STATES BOARD OF TAX APPEALS.

DOCKET No. 93,806.

[SAME TITLE]

It is hereby stipulated and agreed by and between the parties to this proceeding that the following facts may be regarded as having been proved by proper evidence, without prejudice to the right of either party to introduce other competent evidence not inconsistent with the facts herein stipulated:

1. The petitioners are individuals and citizens of the United States and during the calendar year 1934 were married and living together as husband and wife, at 1130 Park Avenue, City and State of New York. For the calendar year 1934, the petitioners filed a joint Federal income tax return with the Collector of Internal Revenue for the Third District of New York within the time required by law.

2. During the calendar year 1934, Chester Gaines sold shares of stock of corporations, which had been held by him for less than one year, and he derived from such sales a recognized capital gain of \$18,466.41.

3. During the calendar year 1934, Theresa Gaines sold shares of stock of corporations, resulting in capital gains or losses to her as follows:

<u>Time Held</u>	<u>Profit or (loss)</u>	<u>Per cent</u>	<u>Taxable Gain or (loss)</u>
1 year or less	\$ 2,987.94	100	\$ 2,987.94
2 to 5 years	(37,091.63)	60	(22,254.97)
5 to 10 years	(2,077.13)	40	(830.85)
Over 10 years	220.96	30	66.29
	(\$35,959.86)		(\$20,031.59)

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Stipulation of Facts.

4. The shares of stock sold by the petitioners, referred to in Paragraphs "2" and "3" above, were capital assets, as defined in Section 117 of the Revenue Act of 1934.

5. On their joint return for the calendar year 1934, the petitioners claimed a capital loss deduction of \$1,565.18 which was arrived at by offsetting the said gain of Chester Gaines amounting to \$18,466.41 against the said loss of Theresa Gaines amounting to \$20,031.59. Said joint return reported a net income of \$34,594.80, on which the petitioners computed normal and surtaxes of \$4,239.26.

6. In his statutory notice of deficiency, the respondent determined that Theresa Gaines was limited to a deductible loss of \$2,000., plus the gains derived by her in 1934 from said sales of stock, and taken into account under the provisions of Section 117 of the Revenue Act of 1934. Accordingly, the amount of \$18,031.59 was added in the deficiency notice to the petitioners' net income as reported on their joint return.

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7. The foregoing stipulations of facts are not to be construed as an admission by the respondent that the excess of the aforesaid losses of Theresa Gaines over the aforesaid gains of Chester Gaines is allowable as a deduction in computing net income subject to tax on the joint return of the petitioners for the calendar year 1934.

(Sgd.) FRANK E. KAREISEN, JR.,
Counsel for Petitioners.

(Sgd.) J. P. WENCHEL,
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Amended Praeipe.

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(Filed October 23, 1939.)

UNITED STATES BOARD OF TAX APPEALS.

DOCKET No. 93,806.

[SAME TITLE]

To THE CLERK OF THE UNITED STATES BOARD OF TAX APPEALS:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, copies duly certified as correct, of the following documents and records in the above-entitled proceeding in connection with the petition for review by the said United States Circuit Court of Appeals for the Second Circuit heretofore filed by the petitioners herein:

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1. Docket entries of proceedings before the Board.
2. Petition.
3. Answer.
4. Memorandum opinion of the Board of Tax Appeals.
5. Order and decision of the Board.
6. Petition for review filed by the petitioners, together with proof of notice of filing same.
7. The stipulation of facts.
8. This praecipe.

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(S) **FRANK E. KARELSN, Jr.,**
Attorney for Petitioners,
230 Park Avenue,
New York, N. Y.

Service of a copy of the foregoing Praeipe is hereby acknowledged this 19th day of October, 1939.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

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Clerk's Certificate.**UNITED STATES BOARD OF TAX APPEALS,****WASHINGTON.****DOCKET No. 93,806.**

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**CHESTER GAINES and THERESA GAINES,
Husband and Wife,
Petitioners,**

v.

**COMMISSIONER OF INTERNAL REVENUE,
Respondent.**

I, B. D. GAMBLE, Clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 26, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praeclipe in the appeal (or appeals) as above numbered and entitled.

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In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 1st day of November, 1939.

B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.
(Seal)

[fol. 27] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT, OCTOBER TERM, 1939

No. 247

(Argued April 10, 1940. Decided April 22, 1940.)

CHESTER GAINES and THERESA GAINES, Petitioners,
against
GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent

On petition to review an order of the Board of Tax Appeals assessing against the petitioners a deficiency in their income taxes for the year 1934.

Before L. Hand, Augustus N. Hand and Patterson, Circuit Judges

Frederick Baum for the petitioners.
Maurice J. Mahoney for the respondent.

Per CURIAM:

Order affirmed upon the authority of Pierce v. Helvering, 100 F. (2d) 397 (C. C. A. 2).

[fol. 28] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 8th day of May one thousand nine hundred and forty.

Present Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Robert P. Patterson, Circuit Judges

CHESTER GAINES and THERESA GAINES, Petitioners,
v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

Miscellaneous:

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Treasury Regulations 65:	
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Treasury Regulations 69:	
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Treasury Regulations 74:	
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Treasury Regulations 77:	
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Treasury Regulations 86:	
Art. 51-1	6, 10
Art. 117-5	4, 5, 6, 10
Treasury Regulations 94:	
Art. 117-5	6
Treasury Regulations 101:	
Art. 117-5	6
Treasury Regulations 103 (Int. Rev. Code), Sec. 19.117-5	6

In the Supreme Court of the United States

OCTOBER TERM, 1939

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER

v.

WALTER C. JANNEY AND PAULINE F. M. JANNEY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD
CIRCUIT

The Attorney General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above cause on December 26, 1939, reversing the decision of the Board of Tax Appeals.

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 35-40) is reported in 39 B. T. A. 240. The opinion of the Circuit Court of Appeals (R. 51-55) is reported in 108 F. (2d) 564.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 29] [Endorsed:] United States Circuit Court of Appeals, Second Circuit, Chester Gaines and Theresa Gaines, v. Commissioner of Int. Revenue. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 8, 1940. D. E. Roberts, Clerk.

[fol. 30] UNITED STATES OF AMERICA,
Southern District of New York:

I, D. E. Roberts, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 29, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Chester Gaines and Theresa Gaines, Petitioners, against Commissioner of Internal Revenue, Respondent, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 8th day of May, in the year of our Lord one thousand nine hundred and forty, and of the Independence of the said United States the one hundred and sixty-fourth.

D. E. Roberts, Clerk. (Seal.)

(7921)

SUPREME COURT OF THE UNITED STATES**ORDER ALLOWING CERTIORARI—Filed October 14, 1940**

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following No. 36.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Roberts took no part in the consideration and decision of this application.

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